2000

Thrifty Payless, Inc., Rite Aid v. Hillside Plaza LTD. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THRIFTY PAYLESS, INC., a California corporation d/b/a RITE AID, Plaintiff and Appellee, v. HILLSIDE PLAZA LTD. d/b/a HILLSIDE PLAZA PROPERTIES, Defendant and Appellant.	**APPELLANT REPLY BRIEF** Supreme Court No. 20000904-CA Priority No. 15 Trial Court Case No. 000902699 Trial Judge Stephen L. Henriod

APPEAL FROM THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY,
JUDGE STEPHEN L. HENRIOD

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I. RITE AID'S OPPORTUNITY TO OFFSET TAX REIMBURSEMENT PAYMENTS AGAINST ACCRUED PERCENTAGE RENTS IS DETERMINED BY THE TIMING OF RITE AID'S TAX REIMBURSEMENT PAYMENTS, AND NOT BY THE TIMING OF HILLSIDE'S TAX PAYMENTS.

Resolution of the 1997 and 1999 offset issues hinges on the interpretation of the sentence in the parties' Lease Agreement which states: "All amounts paid by Tenant pursuant to this article, may be deducted by Tenant from any percentage rent due for the calendar year in which such taxes are paid." In particular, resolution hinges on the phrase "such taxes." Hillside contends that "such taxes" refers to tax reimbursement payments made by Rite Aid. Rite Aid contends that "such taxes" refers to property tax payments made by Hillside. Rite Aid's arguments notwithstanding, the phrase "such taxes" has reference to Rite Aid's tax reimbursement payments for several basic reasons.

First, it is not at all apparent from the parties' Lease Agreement, as Rite Aid wrongly claims, that the phrase "such taxes" categorically refers to Hillside's property tax payments. Furthermore, the term "such taxes" is not a term defined or designated in either the Lease Agreement's recitals or text, so such term's appearance in any given sentence is best interpreted within the context of that given sentence.[1]

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[1] It should also be noted that all other instances of the use of the phrase "such taxes" in the section at issue--other than the one instance at issue--are accompanied by qualifying language expressly identifying that phrase with Hillside's payment of property taxes. In the first instance of "such taxes" (in the first sentence of the first paragraph of

Here, in the sentence at issue ("[a]ll amounts paid by Tenant pursuant to this article, may be deducted by Tenant from any percentage rent due for the calendar year in which such taxes were paid"), the term "such taxes" has only one logical antecedent referent within the sentence, namely, "all amounts paid by Tenant pursuant to this article," *i.e.*, tax reimbursement payments. Nowhere in the same sentence is Hillside's property tax payment to Salt Lake County identified or otherwise referenced. Instead, one has to travel to other sentences in the same paragraph to find any such references. In the absence of any definition or designation of the generic term "such taxes" to mean any one type of payment, the definition of that term must be determined by its placement within its immediate sentence. If we allow a phrase to be defined by other sentences or paragraphs in preference to the very sentence in which the phrase appears, then we must be prepared to accept that the phrase may be defined by reference to any article of the agreement, and that the phrase is therefore inherently ambiguous. From a grammatical and logical standpoint, it makes much more

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Section 4), the same sentence expressly identifies property taxes, and property taxes is therefore the logical antecedent of "such taxes" occurring in the same sentence absent identification of any other types of tax payments or reimbursements. The second instance of "such taxes" (in the first sentence of the second paragraph of Section 4) reads "such taxes assessed against the Premises[,]" an unambiguous reference to property taxes. The third instance of "such taxes (in the fourth sentence of the second paragraph of section 4) is used in conjunction with being "assessed" and of being taxes "to be reimbursed by Tenant," again unambiguous references to property taxes. The fourth instance of "such taxes" (in the seventh sentence of the second paragraph of section 4) is used in the phrase, "such general property taxes," again, an unambiguous reference to property taxes. The fifth instance of "such taxes," however, and the instance that is at issue in this case, is not preceded or qualified by any reference to property taxes, and in fact does not refer to property taxes, but instead refers to property tax reimbursements for the reasons discussed below.

sense to interpret a term or phrase in reference to the specific antecedents as they appear in the same sentence in preference to other marginally related or unrelated sentences or sections. Furthermore, where the sentence at issue contains references only to Rite Aid as a grammatical subject, but none whatsoever to Hillside, it follows that "such taxes" has reference to tax reimbursement payments made by Rite Aid rather than any tax payments made by Hillside to Salt Lake County.

Perhaps more importantly, both of the verbs present in the sentence ("paid" and "deducted") are the predicate of the subject Rite Aid. It makes no logical or grammatical sense for the verb in one sentence (in this case the verb in the clause "such taxes were paid") to refer to the subject in another sentence, as would be the case if "such taxes" in this instance referred to Hillside's property tax payments. Clearly, the term "such taxes" in this instance refers to Rite Aid's tax reimbursements.

Rite Aid posits a factual scenario whereby Hillside could arrange its tax payments so as to force Rite Aid to reimburse Hillside for two separate property tax payments in the same year. It is important to note that this has never happened, and as such, Rite Aid's point in this regard constitutes little more than unsupported and unpersuasive speculation rather than reasoned argument.[2]

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[2] It is also important to note that while Rite Aid's speculative and hypothetical scenario (which has never occurred) at most can only involve two years' payment in one year, Rite Aid's claim to unlimited and cumulative offsets (discussed below) would allow Rite Aid to defer and collect in a later year an unlimited number of previously unclaimed offsets. And in contrast to Rite Aid's speculative scenario, this cumulative offset scenario has

II. RITE AID HAS WAIVED ITS PAST OFFSET CLAIMS BY SILENCE AND INACTION.

Rite Aid makes the misleading statement that "[i]n support of its [waiver] argument, Hillside relies on B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc., 754 P.2d 99 (Utah Ct. App. 1988), a case of questionable precedential value[.]" and then infers, due to Hillside's purported reliance on Woodward, that Hillside's waiver analysis and argument are per se faulty. The allegedly unreliable nature of Woodward stems from Rite Aid's reading of the decision in Soter's v. Deseret Fed. Sav. & Loan, 857 P.2d 935 (Utah 1993), wherein the Utah Supreme Court generally dispensed with all prior case-law attempts to derive general principles of law from specific factual circumstances in favor of the more general standard that "a fact finder should assess the totality of the circumstances to determine whether the relinquishment is clearly intended." Id. at 941.

In fact, Hillside's argument relied on K & T, Inc. v. Koroulis, 888 P.2d 623 (Utah 1994), the most recent Utah Supreme Court jurisprudence on the waiver issue. Not only does Koroulis lay out the three basic elements of waiver, Id. at 628-29, but it also stands for, and was cited for, the propositions that: (1) a waiver is an intentional relinquishment of a known right, Id. at 628; and (2) "[t]he intention to relinquish the right may be either expressed or ***implied*** and may be implied from action or ***inaction***," Id. at 629 (emphasis added).

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actually occurred and is one of the subjects of this appeal. Rite Aid is attempting in this case to collect, in a cumulative and after-the-fact fashion, unclaimed offsets from three to five years prior.

However, Rite's Aid misplaced derogation of Woodward (which Hillside quoted for clarification of the circumstances under which "inaction" may constitute waiver) does not change the fact that Hillside's argument is entirely consistent with Soter's waiver requirements.

The case-specific approach to waiver required by Soter's is due to the fact that "waiver is a term which has various meanings depending on the facts and the context in which it is used." Id. at 942. The Soter's court, while pointing out that waiver may be more clear and distinct where there is an express waiver, also acknowledged the possibility that waiver can be implied from conduct or silence when "there is some duty or obligation to speak." Id. at 940. Such intention need only be shown by a preponderance of the evidence. Id. at 942 n.6.

Here, waiver can be implied from Rite Aid's absolute silence for three to five years as to offsets for which Rite Aid was otherwise entitled to make an election, but for which it failed to do so in even a reasonably timely manner. Under the parties' Lease Agreement, Rite Aid was required to generate and submit a percentage rent report, as well as pay its percentage rent for a given calendar year, by March 30 of the following year. Applicable offsets should be reported in the percentage rent report submitted for a given year. Hillside is entitled to rely on the accuracy of such reports, and has in fact relied on the accuracy of such reports in making certain business decisions and making certain business expenditures. At no time did Hillside contemplate or expect that the reports would not reflect material

claims, such as offset, or that such material modifications could be retroactively made at any time in the indeterminate future. If Rite Aid's silence as to its purported offsets under these circumstances did not constitute a waiver, then Rite Aid could fail to request offsets for an indeterminate number of years, either sporadically or cumulatively, and only after the end of such indeterminate period demand a refund of all offsets in one lump sum[3] (and, as argued by Rite Aid, with a guaranteed interest rate accruing and payable from the party innocent and ignorant of the putative "mistake" to the negligent party responsible for the mistake). This would convert Rite Aid's offsets into open-ended and retroactive options of unlimited duration, and make Hillside's business planning and capital expenditures uncertain, if not impossible.

In short, Rite Aid's waiver can be implied from Rite Aid's failure to invoke the discretionary offset clause contained in the parties' agreement, as well as from a totality of the circumstances, particularly where: (1) Rite Aid, as party to that contract, is deemed to be cognizant of such terms and cannot excuse its inaction solely on the bases of mistake or inattention in relation to the provisions of the parties' contract; and (2) where such

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[3] This holds much more potential for mischief and abuse than Rite Aid's hypothetical example of Hillside cynically timing tax notices in such a way that Rite Aid is forced to make two tax reimbursement payments within the same calendar year. Its potential for abuse is demonstrated by the facts that: (1) the Rite Aid scenario has already occurred while the hypothetical Hillside scenario has never occurred (as noted elsewhere, Hillside has always given Rite Aid notice by November 30 of each year); and (2) the Rite Aid scenario can involve an indeterminate number of years which can be invoked cumulatively at some indeterminate future time, whereas the Hillside scenario involves a hypothetical short-term gain that can only be repeated every other year.

discretionary offsets, from the face of the contract and the totality of the circumstances, were clearly anticipated to be exercised on a yearly basis rather than on an open-ended basis of unlimited duration. In the totality of the circumstances, it was Rite Aid's three- to five-year inaction and/or silence in failing to assert presumptively known contractual rights that reasonably led Hillside to conclude that Rite Aid was not invoking the offset for the calendar years in question, and to make certain business decisions and capital expenditures accordingly. Further, because it is clear that no material facts in this case are disputed, but only the purported effects of such undisputed facts, this Court can make a determination of waiver from the totality of the circumstances of this case as presented in the parties' undisputed facts.

III. THE LOWER COURT IMPROPERLY AWARDED PRE-JUDGMENT INTEREST, COSTS, AND ATTORNEYS FEES, AND ERRED BOTH AS TO THEIR AVAILABILITY AND AMOUNT.

Rite Aid argues that Hillside's argument against an award of attorneys fees is somehow an argument raised for the first time on appeal. An award of attorneys fees was not an issue prior to summary judgment. However, Hillside's inability to meaningfully review the basis, reasonableness and nature of work underlying such fees did become an issue post-judgment, and was preserved below in objections made to the lower court and as preserved in the record on appeal. It is not an issue raised here for the first time on appeal, as wrongly intimated by Rite Aid. While it is arguable whether Rite Aid can collect attorneys fees over the tax reimbursement issue (given that the dispute was due to the

ambiguous draftsmanship of Rite Aid's predecessor-in-interest and not due to any knowing breach or scienter on the part of Hillside), it confounds reason to argue that Rite Aid is entitled to attorneys fees on the offset issue, which arose from Rite Aid's own allegedly mistaken overpayments and self-inflicted negligence and not from any knowing breach or scienter on the part of Hillside. Rite Aid is in effect arguing a standard whereby it is to a party's benefit to engage in ambiguous draftsmanship and slack and negligent business practices, insofar as doing so enhances the probability of an award of attorneys fees and interest at the other party's expense. In other words, Rite Aid is arguing not only a no-cost standard of business negligence, but actually a profitable one.

Rite Aid argues that it is entitled to interest on amounts mistakenly overpaid because Hillside had the use and benefit of such money during such periods. Rite Aid's argument fails to address two important points. First, it never addresses the issue of scienter. Had Hillside defrauded Rite Aid of such funds, or in any way caused Rite Aid's mistake, then there would be no question that Hillside would be charged with the opportunity cost of knowingly and wrongfully holding such funds. On the other hand, where Hillside is ignorant of any such mistake, and such mistake is in fact occasioned by Rite Aid's own negligence and carelessness, the burden of Rite Aid's lost opportunity cost in relation to such funds rightly falls on Rite Aid where it has needlessly created such a situation.

Furthermore, Rite Aid has not addressed the argument that its proposed standard encourages a perverse incentive for a party in Rite Aid's position: the more careless and

dilatory a mistakenly overpaying party is, the more interest it can collect at a guaranteed rate from the pocket of an innocent and ignorant recipient. This is a perverse result that offends equity, and has no support in law. And it is of note that Rite Aid has still failed to adduce any authority for such a ground-breaking proposition. What law Rite Aid does cite allows for pre-judgment interest only for "damages due to the defendants' ***delay*** in tendering an amount clearly owing under an agreement or other obligation." Baker and Little v. Dataphase, Inc., 781 F. Supp. 724, 731 (D.Utah 1992) (emphasis added). It is axiomatic that Hillside could not "delay" repaying overpayments before it ever had knowledge of their nature as allegedly mistaken overpayments, yet Rite Aid is claiming pre-judgment for time periods prior to April 1999, the time when it first informed Hillside of the alleged overpayments. (It is arguable whether time periods after April 1999 constitute a "delay" where Hillside has a good-faith waiver argument.) Rite Aid has yet to adduce authority for the proposition that a mistaken overpayor can collect pre-judgment interest from an innocent and ignorant payee for the overpayor's gratuitous and self-inflicted loss.

More important, Rite Aid does not take its own argument seriously that pre-judgment interest is justified where one party has the use and benefit of another's money. If so, Rite Aid would concede that it is not entitled to pre-judgment interest for periods when it withheld sums equivalent to its overpayments from rent amounts due and owing to Hillside. It is notable that Rite Aid has made no such concession, but appears to be demanding interest on the sums at issue even during times when Rite Aid held those sums as offsets. Rite Aid is

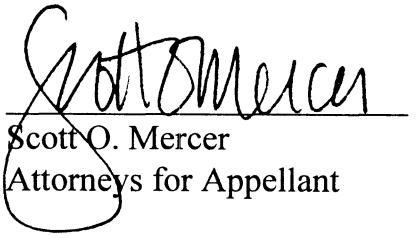
engaging in heads-I-win-tails-you-lose reasoning: it argues for a "use of funds" standard when it would support Rite Aid's overall award, but ignores or fails to address the uniform applicability of such a standard where to do so might reduce the amount of Rite Aid's award in any way. Rite Aid's inconsistent, selective and self-serving use of such an argument speaks for itself.

CONCLUSION

For the foregoing reasons, the lower court's Minute Entries should be reversed, and this case remanded for a decision consistent with this Court's determination. Likewise, the lower court's award of attorneys fees and pre-judgment interest should be vacated as improper and without legal basis.

DATED this 11 day of May, 2001.

KESLER & RUST



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **REPLY BRIEF OF THE APPELLANT**, in Case No. 20000904-CA, postage prepaid, this 11th day of May, 2001, to:

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